SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Argument on Specification of Errors

First. The Court of Claims erred in rejecting the petitioner's interpretation of the provisions of Article 19 (a) of the contract, which was said by the Court of Claims to have been stated by petitioner in its reply brief in that Court in the following language: "We submit that under Article 19 of the contract the defendant undertook the responsibility of supplying plaintiff with sufficient workers to properly staff the job" (R. 79).

The problems of this case center around the interpretation of Article 19 (a) of the contract, which reads as follows:

"Article 19 (a) *Labor preferences.*

"With respect to all persons employed on projects, except as otherwise provided in Regulation No. 2, (a), such persons shall be referred for assignment to such work by the United States Employment Service, and (b) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls: *Provided, however,* that, expressly subject to the requirement of subdivision (b), the supervisory, administrative, and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service."

A provision identical in terms with the foregoing was the basis of the litigation in the case of *Young-Fehlhaber Pile Co.* v. *U. S.*, 90 C. Cls. 4. The Court of Claims in that case permitted recovery against the United States on facts presenting no legally significant distinction as compared with the present case. The Court of Claims presented the essential doctrine then accepted in the following statement in its opinion in the *Young-Fehlhaber* case, at p. 13:

"There is in fact no provision in the contract that defendant should furnish a sufficient supply of labor, and nothing is said therein with reference to the plaintiff being entitled to recover damages in case such a supply was not furnished. The nature of the contract, however, was such that we think it carried an implied agreement to furnish the men necessary to carry on the work. It must have been understood between plaintiff and the defendant's agents who prepared and executed the contract that plaintiff would be permitted in some way to obtain a sufficient force to carry on the work contemplated thereby. The provisions contained in the contract with reference to the source from which the plaintiff should obtain its workers surely were not understood

by the parties to mean that if the workmen could not be so obtained the plaintiff would not be permitted to obtain the necessary workmen to complete the contract. Under any other construction, we would have in one part of the contract a provision that plaintiff must complete it within a certain time, and in another part a provision which meant that it could not be completed in event there was a shortage of workmen."

"• • • We • • • conclude that the contract in the case at bar carried an implied provision that the defendant would furnish the necessary workmen to complete the work within the required time. It follows that by its failure so to do the defendant breached the contract and was liable in damages."

"In *Black* v. *Woodrow*, 39 Md. 194, 215, it is said:

" 'It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Thus, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied.' " 90 C. Cls. 4, at 13.

In the present case, however, the Court of Claims announced an essentially different doctrine in interpreting Article 19 of the contract (identical in wording with the contract provision discussed in the *Young-Fehlhaber Pile Co.*

case). In its opinion in the present case, the Court of Claims stated:

"We think, therefore, that Article 19 was a promise by the plaintiff not to employ labor except as therein provided. We think it also, by implication, contained a promise by the Government to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79).

In the Young-Fehlhaber opinion the central doctrine is that Article 19(a) "carried an implied provision that the defendant would furnish the necessary workmen to complete the work within the required time." In the present case, the central doctrine laid down by the Court of Claims is that the United States impliedly promises "to make it *possible* * for him (the contractor) to get his work done, if (even though) there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff." The vital difference between the two formulas lies in the *treatment of the time element* and the relatively large extra costs and losses which any substantial retardation in the execution of the work due to labor shortages must inevitably place on the contractor. The formula laid down in the present case means that the United States must make it *possible* for the contractor to get his work done *ultimately*. But to afford the bare possibility of getting the work done ultimately is very different from the requirement of genuine cooperation. To permit the infiltration of non-relief labor that is formally referred by the United States Employment Service after serious

* Italics supplied.

technical delays and that *desires* to work for the contractor is radically different from *furnishing* the "necessary workmen." And to furnish the necessary workmen to get the work done within the *necessary time* is radically different from making it *possible* for the contractor to get his work done after 657 days beyond the original contract period had elapsed, a large percentage of these extra days being required (as admitted by both parties in this case) exclusively because of long continued labor shortages on the job in question, shortages that were quite beyond the power of the petitioner to remedy.

Now which of these two doctrines as to the interpretation and application of Article 19(a) is the correct one? The question is of general interest, not only with respect to cases which have occurred in the past, but also with regard to contracts that may be entered into in the future.

It may be proper to add that many of the criticisms directed against the doctrine of the Young-Fehlhaber Pile Co. decision wholly fail of their mark if that decision be interpreted not as requiring the United States in all cases, as a matter of inescapable obligation, to furnish adequate labor from the relief rolls or from other sources to complete the work upon any Public Works Project within the necessary time, but rather as imposing upon the United States a duty of an alternative nature, either to furnish the necessary labor or to *waive* the *requirement* that only workers directly referred to the work by the United States Employment Service be employed. Under the latter interpretation, the United States need never incur any liability. For in all cases where the United States, through its various agencies, finds itself unable readily to furnish the necessary labor force for a particular project, the United States, through its contracting officers, may waive the requirement that only workers so referred or furnished be employed.

Thus, the United States can in all cases transfer at will to the contractor the burden of securing that part of the necessary working staff which has not been "referred" to him in a timely manner by the appropriate government agencies.

But the gulf between the doctrine of the Young-Fehlhaber decision even when thus interpreted and the doctrine formulated and acted upon in the present case remains too broad to be bridged by compromise formulas and too deep to be explained away on the basis of minor diversities of fact as between the two groups of cases litigated. The choice among the applicable legal doctrines, in view of the long continued failure of the Court of Claims to find and maintain a satisfactory central position on these questions, can now be made effectively only by the intervention of the United States Supreme Court. The successful operation of Public Works Projects as a means of relieving unemployment and economic waste in the future largely depends upon the willingness of the Supreme Court to accept the responsibility of presently announcing guiding principles in this important field of legal controversy.

Second. The Court of Claims erred in holding that the duty of the Government under the provisions of Article 19 was merely "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79).

The Court of Claims rejected petitioner's interpretation of Article 19 of the contract and, in place thereof, substituted an affirmative interpretation of its own which is stated in the language recited in this specification of error.

The expression "fair consideration for the problems and difficulties of the contractor" suggests a moral rather than

a legal standard. Taken by itself, this expression is perhaps too indefinite to enable the reader to ascertain the precise test which the Court intended to lay down, but the wording used seems plainly to indicate a test different from the test of reasonable diligence on the part of the officers of the United States. The test of reasonable diligence appears to have been relied upon by the Court of Claims in the cases of *Seeds & Durham* v. *The United States*, 92 C. Cls. 97, and *Frazier-Davis Construction Co.* v. *The United States*, 100 C. Cls. 120. In the *Frazier-Davis* opinion, the Court says, at p. 160: "As to plaintiff's allegation that defendant failed to promptly furnish labor as needed, the evidence shows that there was no unreasonable delay in referring labor as promptly as was possible under the circumstances. Defendant acted diligently and did all it could to refer all labor requisitioned by plaintiff • • • Defendant was only bound to act with reasonable promptness in referring workmen when requested and was not bound by any stipulation to have such workmen report for work within any stated period of time." But this doctrine that the United States is only bound to act with reasonable diligence still assumes that the United States is obligated affirmatively to supply and furnish the labor requisitioned by any contractor, obligated by contract terms similar to those of Article 19 of the present contract. The doctrine of the present opinion that the duty of the United States is merely to apply the provisions of this Article with "fair consideration of the problems and difficulties of the contractor" does not recognize the duty of reasonable diligence in discharging an assumed affirmative duty to furnish the labor requisitioned. And furthermore, as set forth more fully in the discussion of the third specification of error, the Court of Claims did not effectively apply its own test of "fair consideration." The Court did not in fact act on the

view that officers of the Relief Administration or the United States Employment Service were legally obligated to bring about the transfer to petitioner of such numbers of laborers then on the relief rolls as would actually suffice to staff the work on petitioner's project.

The meaning attributed by the Court of Claims to the formula used in the present case is best ascertained from the concluding clauses of the statement quoted in the present specification of error. The duty of the Government is stated to be "to make it possible for him (the contractor) to get his work done." Merely to make it possible for the contractor to conclude his work at some indefinite period in the future does not imply that the Government is obligated to make diligent efforts or to apply a standard of reasonable affirmative activity in order to supply and furnish the labor. The statement does not include the important element that the Government should make it possible for the contractor to get his work done *on time* and *without avoidable extra expense*. If the statement is to be taken in its natural and probable sense, it means that the duty of the Government is merely to refrain from obstructionist tactics so that the contractor will be permitted, in the long run, to get his work done somehow, albeit with excess cost due to increased overhead and maintenance expenses during the extensions of time.

Again the formula of the Court is open to criticism in reciting that it is the duty of the Government "to make it possible for him (the contractor) to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff." This statement of the Court gives an ambiguous and misleading impression. There was abundant relief labor "available" in one sense but not "available" without helpful affirmative action by the United States Em-

ployment Service and the Works Progress Administration authorities in excluding such persons from the relief rolls when they rejected opportunities of private employment, that is, when they were referred or ought to have been referred for assignment to work on petitioner's project and did not, in fact, engage in or start upon such work. Again there were persons not on relief who were actually *obtainable* for the work in question but who were not registered with the United States Employment Service and who did not "desire to work for the plaintiff" in such a sense that they were willing to get registered with the United States Employment Service and cooperate throughout the slow mechanics of the referral process. If the Government has appropriated millions of dollars to be spent on construction projects chiefly for the very purpose of creating opportunities for employment, then the duty of the United States Employment Service to facilitate the transfer of relief labor to the work on such projects is plain and, if the agencies of the Government, whether it may be the United States Employment Service or the Works Progress Administration, refused or failed to bring about such transfers of necessary labor, a contractor who was undertaking the execution of a construction project for the Government is entitled to treat this failure on the part of the agencies of the Government as a breach of contract on the part of the United States. Any construction contractor who bids on contracts of the same nature and classification as the contract presently under litigation is entitled to act upon this fair and natural interpretation as to the legal obligations assumed by the United States. (See also Executive Order 7060,[5] Regulation No. 2, included in the present contract as amended.)

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[5] Supra p. 7.

The "fair consideration" formula relied on by the Court of Claims in the present case relieves the United States of any affirmative duty with reference to supplying labor, and would apparently require a liability only in the case of an unjustifiable positive act of interference chargeable to the United States which in fact delayed the execution of the contract, or in cases where the failure of the agencies of the United States to cooperate has been so complete that the contractor has not been able, because of such failure, to complete the contract at all. Such a loose test as to the duty of the United States under the implied obligations of the contract here in question would certainly serve as a radical deterrent to the acceptance by independent contractors of labor provisions of this sort in the future negotiation of contracts with the United States throughout a long period of time to come. The ultimate result would probably be to hinder the United States seriously in the execution of relief projects of this nature whereby new opportunities of employment could be created in periods when private industry is depressed.

Third. The Court of Claims erred in holding, in spite of adequate and uncontradicted evidence set forth in the record against its conclusion, and without any direct evidence set forth in the record to support its conclusion, that "it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract."

The opinion of the Court of Claims might almost be said to have been expressed in the alternative. It states that the United States did not violate its contractual obligations, but nevertheless at several points the position is taken that, even assuming that the United States had violated its contract, these breaches of contract were not the cause of the delays from which petitioner suffered so much damage. No

subtle theory of causation is involved, but merely the apparent belief on the part of the Court of Claims that the damage would have happened just the same, even if the United States had waived the requirements of Article 19. The Court states, at R. 82, "We think it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract. The plaintiff had a shortage of labor because there were not enough men, at the place and time, who wanted to work for the plaintiff, so it cannot recover, unless the Government guaranteed to put enough men into the plaintiff's employ and keep them there, to man the job adequately, or pay the plaintiff damages if there should be a shortage, however unavoidable."

The statement of the Court of Claims that there would have been a shortage of labor even if the requirements of Article 19 had been wholly dispensed with is entirely gratuitous and without support in the record. There is plain and uncontradicted evidence in the record to show that there was abundant qualified labor available in the district. There was evidence that there were hundreds of men willing to work who applied to the petitioner for employment but whom petitioner could not directly employ because petitioner was not permitted, under the terms of its contract, to employ men "off the street." Petitioner sent or actually transported many of these applicants to the offices of the United States Employment Service but the ultimate result was that, under the complicated system set up by the United States Employment Service for processing such applicants, very few of these men were actually employed on petitioner's project.

Again there was abundant evidence to show that there was enough labor "available" on the public relief rolls in the district where petitioner's project was located so

that there would inevitably have been an abundant labor supply for the petitioner's needs if the binding statutory requirements had in fact been complied with and such available labor had been removed from the relief rolls in cases where the laborers in question were referred for assignment to petitioner and did not in fact engage in or start upon work for the petitioner. In order to underscore this important point, petitioner asks the permission of the Court to take the unusual course of attaching to this petition and brief a copy of an important exhibit introduced in evidence before the Court of Claims consisting of a certificate from the Secretary of Labor and Industry of the Commonwealth of Pennsylvania, which sets forth the numbers of persons in selected occupational groups as registered month by month in the offices of the Pennsylvania State Employment Service and drawing relief payments during the period from August 1935 to October 1938, a period which covers the entire operation of the present contract.

The petitioner asks this unusual privilege because it asserts and maintains that the denial by the Court of Claims of any recognition of this credible and self-sufficient official record constitutes arbitrary and unreasonable action on the part of that Court in violation of the rights of the petitioner to procedural due process of law. This exhibit is not even mentioned in the opinion of the Court of Claims. That Court seems to have missed entirely the significance of the affirmative proof thus presented, proof which was never contradicted or offset by any other evidence.

Fourth. The Court of Claims erred in failing to give proper effect to the provisions of the Emergency

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[6] Supra p. 4.

Relief Act of 1937, 50 Stat. 352, 15 U.S.C.A. 721-728,[6] and in failing to treat as a breach of contract with petitioner the refusal and failure of officers in charge of work relief in the area where petitioner's project was under operation to remove from the relief rolls, in accordance with the statutes of the United States and the regulations of the President properly applicable thereto, sufficient personnel to properly staff the work on petitioner's project, and their refusal or failure to take those other steps and proceedings legally required by the statutes and the regulations, which, if taken, would have had the effect of causing and inducing sufficient numbers of qualified men then and there on the public relief rolls to start and continue actual labor on petitioner's project at such times and under such conditions as would, in fact, have brought about the timely completion of said project.

This question was adequately presented in petitioner's brief before the Court of Claims but was substantially ignored in the opinion of that Court, notwithstanding its vital significance for the decision of this case and many other like cases.

The Emergency Relief Act of 1937, 50 Stat. 352,[7] 15 U. S. C. A. 802, 803, amending the Act of 1935, 49 Stat. 115, appropriates $1,500,000,000 for work relief and further provides as follows:

"Provided, That no person employed on work projects and certified as in need of relief who refuses a bona-fide offer of private employment under reasonable working conditions which pays as much or more in compensation for the same length of service as such person receives or could receive under this appropriation and who is capable of performing such work, shall be retained in employment under this appropriation for the period such

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[7] Supra p. 4.

private employment would be available: * * *'' (See also Executive Order 7060,[8] Regulation No. 2, which was issued on June 5, 1935, under authority of the Emergency Relief Act of 1935, 49 Stat. 119[9]).

The claimant in this case contracted independently with the United States through the War Department and the employment it offered to workmen was private employment within the meaning of the provisions of the Emergency Relief Act just quoted. Although this statutory proviso was enacted in terms after the date of petitioner's original contract with the United States, yet it was in force during the working seasons of 1937 and 1938, during which time a large percentage of the work on the contract now in suit was performed. Furthermore, this proviso is really declaratory of the essential meaning and purpose of relief statutes enacted prior to the formation of the present contract. (See Executive Order 7060,[10] especially Regulations No. 2 and No. 6 thereof, which were issued under the authority of the Emergency Relief Act of 1935,[11] 49 Stat. 115.) The faithful enforcement of this provision would have greatly accelerated the completion of the work by facilitating the movement to petitioner's employment of men on the public relief rolls who were referred or ought to have been referred for assignment to work on petitioner's project but who did not, in fact, engage in or start upon such work. If the labor actually ''available'' in this sense on the relief rolls had been transferred effectively to work on petitioner's project, that project would have been brought to a completion in October or November of 1937 and the damages, the recovery of which is now sought from the United States, would not have occurred.

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[8] Supra p. 7.

[9] Supra p. 4.

[10] Supra p. 7.

[11] Supra p. 4.

There can be no doubt that these provisions impose a definite legal duty upon the officers of the United States in charge of the expenditure of the funds appropriated under the Emergency Relief Acts. It seems correct also to say that these provisions mean that the United States in its legislative capacity has created duties which rest upon the United States itself as a contracting party. (Compare *Perry* v. *The United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. Ed. 912; *Lynch* v. *The United States*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434.)

But do these provisions create also legal rights vested in parties contracting with the United States so that such parties may treat such a breach of legal duty by the United States as a breach of their contracts and a ground for the recovery of damages thereby caused? Does the public wrong, the violation of a public statute, create a private right of action in favor of those injured by the wrong?

The Restatement of Contracts (as adopted and promulgated by the American Law Institute), Section 315 defines breach of contract in general terms as follows:

> "1. Prevention or hindrance by a party to a contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party, or the discharge of a duty by him, is a breach of contract, unless
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> "(a) The prevention or hindrance is caused or justified by the conduct of the other party, or
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> "(b) The terms of the contract are such that the risk of such prevention or hindrance as occurs has been assumed by the other party."

On the assumption that the United States violated a legal duty in failing to withhold payments and allowances under the Emergency Relief Acts to persons who were referred or ought to have been referred for assignment to work on petitioner's project pursuant to the statutes

and regulations legally applicable, we have clearly an instance of the "prevention or hindrance" by the United States of an occurrence, namely, the free flow of labor requisite under the contract for the "discharge of a duty" by the claimant, namely, claimant's duty under Article 19 of the contract to employ only workmen referred for assignment to this work by the United States Employment Service, "preference" in employment being given to persons from the public relief rolls. Furthermore, this prevention or hindrance is wrongful, not only on the general ground that it tends strongly to prevent the due and timely performance by the claimant of its duties, but also on the additional ground that such prevention or hindrance is specifically forbidden by the Emergency Relief Act of 1937, 50 Stat. 352,[12] and such prevention or hindrance is made legally wrongful on the grounds of public policy. Where there is legally wrongful conduct causing harm to a party entitled to protection or exemption from such harm, a remedial action in favor of such a party should become available.*

The treatment by the Court of Claims of this important issue in its opinion in the present case was peculiarly inadequate. The Court said, at R. 81, "It may be that it (the Government) could have, by the closing down of relief work projects in adjacent areas compelled men to take jobs with the plaintiff and board away from home, though the net wages available to support their families would have been small. We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract."

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[12] Supra p. 4.

* Compare the analogies set forth in "Public Wrong and Private Action," 27 Harvard Law Review, 312, by Dean Ezra R. Thayer.

But the expressed major premise that the Government's failure to handle the mass of relief labor according to statutory requirements must have been in some special sense "inconsiderate of the plaintiff's difficulties" quite clearly involves a false and untenable legal assumption. Any substantial prevention or hindrance of petitioner's discharge of its contract duties would be sufficient to constitute a breach of contract. Harmful and actionable breaches of contract are not confined to cases where the Government has been markedly or quite unreasonably "inconsiderate of the plaintiff's difficulties." In this case the facts even as outlined by the Court of Claims in the particular excerpt just quoted indicate that the Government, by a refusal and failure to perform its statutory duties with reference to releasing or transferring workmen on the relief rolls back into private employment, has substantially hindered an "occurrence or performance requisite under the contract," namely, the preferential employment of relief labor. Petitioner, if confined to the use of certain classes of labor, is entitled to have its access to the indicated labor groups free from "prevention or hindrance" caused by conduct of the Government directly in violation of controlling statutes framed for the very purpose of securing the free flow of relief labor back to private employment.

The petitioner does not contend that the United States should have compelled "men on the relief rolls" to work for petitioner in the sense of exerting physical compulsion or any illegal compulsion. The petitioner contends merely that the agencies of the United States should have complied with their statutory duties with reference to removing from the relief rolls men who had been referred or ought to have been referred for assignment to work in private employment and had failed to engage in or start upon such work. If the agencies of the United States had complied with their

statutory duty in this respect, this would, indeed, have had the effect of bringing a certain economic and practical pressure to bear upon these men referred for assignment to work on petitioner's project to engage actually in such work, but such a result is exactly the result contemplated by the statutory provisions in question. The Court of Claims confuses the issue by using such colorful phrases as "forcibly recruit workmen for the plaintiff." It is incorrect and highly unfair to suggest that the execution of a statutory duty is tantamount to illegal compulsion or the use of physical force.

Fifth. The Court of Claims erred in disposing of petitioner's contention that respondent's violation of the provisions of 50 Stat. 352 [13] was, in legal effect, a breach of contract on the part of the United States on the basis of the following proposition stated in its opinion: "We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract."

Here again the Court of Claims refers to the "fair consideration" test as the determining factor with reference to respondent's liability. It would seem that the duty of officers of the United States to comply with the provisions of statutes of the United States does not depend upon the existence of any special difficulties and problems in the way of any particular contractor. Much less does it depend upon the point that "fair consideration" or any special ethical consideration might require that the Government should remove from the relief rolls persons who had been referred or ought to have been referred for assignment to work on the petitioner's project. The statutory mandate

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[13] Supra p. 4.

(50 Stat. 352) is plain and direct and admits of no exceptions relevant to the present controversy. The breach of this statutory duty was the direct and immediate cause of harm to the petitioner in the form of a continuing labor shortage. It was plainly proved by Exhibit "A", attached to this petition and brief, which was in evidence before the Court of Claims, that there were great numbers of men on relief in the immediate vicinity where petitioner's project was being conducted and that these men were retained on relief in violation of the statutory requirements, notwithstanding that they should have been referred to petitioner's project in conformity with the requirements of the statute (50 Stat. 352)[14] and Executive Order 7060,[15] Regulation No. 2, the latter of which was referred to and made a part of the contract in Article 19.

The language used by the Court of Claims and referred to in the present specification of error shows the special animus of that Court with respect to the issues presently under litigation in more than one particular. For example, the use of the expression "the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff" indicates that the Court felt that to remove men from the relief rolls would be like dragging them forcibly as physical victims to work on petitioner's job. But the pressure involved in removing these individuals from the relief rolls would only have been such pressure as the statute obviously contemplated and required. It ought not to be stigmatized as *forcible* in any event. The denial of probable benefit is not equivalent to the use of force and should not be assimilated with the odious associations that relate to the use of physical violence by public officers. As was said by Mr. Justice Stone in *United States* v. *Butler*, 297 U. S. 1, 86, 56 S. Ct. 312, 328, 80

[14] Supraa p. 4.

[15] Supra p. 7.

L. Ed. 477, 499, "If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end."

The statement of the Court of Claims that "it has not been proved that the refusal of the relief authorities • • • was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract" shows again the exacting nature of the test which the Court of Claims had in mind. What proof could the petitioner adduce to demonstrate that the failure of the respondent to comply with the statutory requirement was specifically and excessively "inconsiderate" of its difficulties, other than the showing of the protracted and harmful delays due to the continuous labor shortage which was, in turn, caused by the failure of the United States Employment Service to process through its technical procedure either men whom petitioner could have employed "off the street" or men who ought to have been referred for assignment to work on petitioner's project who were drawing relief payments through long periods in the district where petitioner's project was under operation? Ample proof of such delays and of the dominant part played by agencies of the United States in causing such delays through their failure to transfer to petitioner labor that was actually available is contained in the record. Since the difficulties of the petitioner in this regard lasted for many months and caused a delay of 149 days in the performance of the contract, it would seem clear that the difficulties were not of so slight or transitory a character that the agencies of the United States could ignore them without being markedly

"inconsiderate." Since the work on petitioner's project was finished by 91 days of actual new work in 1938 (that is, work in addition to repairing damages and displacements that occurred during the winter of 1937 and 1938), it is clear that the entire work could have been finished in the fall of 1937 if the 149 days delay caused by labor shortages occurring prior to November, 1937, could have been eliminated. The action of the agencies of the United States was "inconsiderate of the plaintiff's difficulties" in the sense that it ought to have been foreseen that great damages would accrue to the petitioner due to the prolongation of the work brought about by the continuous labor shortage.

If it be assumed that the conduct of the agencies of the United States caused or contributed to cause the labor shortages whose harmful effects on petitioner could easily have been anticipated, there can be no real ground for saying that the agencies of the United States were not "inconsiderate" of petitioner's difficulties. In ordinary civil relations, where one party does an act which he ought to foresee would cause harm to another party, and harm is in fact thus caused, the case may ordinarily be treated as one of actionable negligence. In the present case, where the parties are bound together by an elaborate formal contract and affirmative duties are assumed by each of the parties, any failure of either party to perform an affirmative duty should be regarded as "inconsiderate" in instances where it was foreseen or ought to have been foreseen that substantial damages would result from the failure to perform the affirmative duty in question.

Sixth. While the statement of the Court of Claims that it had insufficient evidence of damages from June 15, 1938, to the completion of the work may perhaps be disregarded in view of the actual holding that the Government was not liable under the contract, the plain fact is that evidence

was presented of damages claimed, by units of a day, on either a one, two or three shift basis. Petitioner could, of course, not anticipate the actual number of days delay for which the Court might award it damages, and did not burden the record with total computations covering all period of time from one to one hundred and forty-nine days. It did prove its damages for the total delays claimed in the petition, and itemized them by daily and shift units. On the evidence presented the Court of Claims could, and can, figure damages for any given period by a simple mathematical calculation.

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